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MICHAEL RODAK, J

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1440, 73-1441, 73-1442

MCBRYDE SUGAR COMPANY, LIMITED and OLOKELE SUGAR COMPANY, LIMITED, *Appellants,*

v.

STATE OF HAWAII, ET AL., *Appellees.*

SELWYN A. ROBINSON, ET AL., *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

IDA ALBARADO, ET AL., *Petitioners,*

v.

STATE OF HAWAII, ET AL., *Respondents.*

On Appeal from the Supreme Court of the State of Hawaii, and on Petitions for Writs of Certiorari to the Supreme Court of the State of Hawaii

REPLY MEMORANDUM FOR THE APPELLANTS AND PETITIONERS

ERWIN N. GRISWOLD
1100 Connecticut Ave., N.W.
Washington, D. C. 20036

J. RUSSELL CADES
ROBERT B. BUNN
First Hawaiian Bank Building
Honolulu, Hawaii 96808
Counsel for
McBryde Sugar Co., Ltd.

(Names of counsel continued on inside cover)

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

WILLIAM F. QUINN
1600 Castle & Cook Building
Honolulu, Hawaii 96813
Counsel for
Olokele Sugar Co., Ltd.

J. GARNER ANTHONY
JOHN H. R. PLEWS
Ninth Floor, 333 Queen Street
Honolulu, Hawaii 96813
Counsel for
Selwyn A. Robinson, et al.

ROBERT B. BUNN
First Hawaiian Bank Building
Honolulu, Hawaii 96808

CLINTON I. SHIRAISHI
Room 208
Lihue Shopping Center
Lihue, Kauai, Hawaii 96766
Counsel for
Ida Albarado, et al.

Of Counsel:

REAVIS, POGUE, NEAL & ROSE
Washington, D. C.

CADES, SCHUTTE, FLEMING
& WRIGHT

GOODSILL, ANDERSON & QUINN

ANTHONY, HODDICK,
REINWALD & O'CONNOR
Honolulu, Hawaii

SHIRAISHI & YAMADA
Lihue, Kauai, Hawaii

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Despite the breadth and gravity of the contentions raised by Appellants and Petitioners, the State of Hawaii, in its Motion to Dismiss and Response to Jurisdictional Statement, has addressed itself solely to the Fourteenth Amendment claims, and one of the jurisdictional issues posed by the appeal herein, and all in summary fashion. Its arguments fail to meet the issues raised and are inadequate.

1. As the State of Hawaii says, no federal or constitutional question was raised in the trial court, and

no federal or constitutional question was raised by any of the parties, including the State, when the case was first presented to the Supreme Court of Hawaii. No federal or constitutional question was raised at that time because there was no such issue in the case, either under the pleadings, or in the arguments made by any of the parties. Indeed, neither Stat. L. Kamehameha III, 81 et seq. (1847) nor Hawaii Rev. Stat. § 7-1 were cited or made the basis of any claim by any party, either in the trial court, or in the briefs filed before argument in the Supreme Court of Hawaii.

The federal and constitutional questions came into the case for the first time when the Supreme Court of Hawaii announced its decision. They are implicit and inherent in that decision, even though the Supreme Court of Hawaii did not deal with federal or constitutional questions in its opinion. Such questions were then considered in the dissenting opinion of Judge Marumoto (App. 93-209), and later in the dissenting opinion of Judge Levinson (App. 115-158).

The federal and constitutional questions were specifically raised and presented to the Supreme Court of Hawaii by the parties through petitions for rehearing which were timely filed after the decision of the court was announced. This was the first opportunity to raise these questions. An effort was made to present these questions in oral argument before the court, but this was refused by the court. In this situation, the fact that the Supreme Court of Hawaii did not consider these questions, and did not expressly dispose of them, is irrelevant as far as the jurisdiction of this Court is concerned. Indeed, the handling of these questions by the Supreme Court of Hawaii raises further questions under the procedural aspects of the Due Process Clause.

2. The primary basis for the State's opposition to this Court's review of the Hawaii Supreme Court's decision appears to be that Appellants and Petitioners had [1]

> "no vested property rights in judicial decisions which are contrary to the express wording of a statute which has been in existence in Hawaii since 1850 [Hawaii Rev. Stat. § 7-1]."

In support of this conclusion, the State relies on language in three judicial decisions—noticeably none by this Court.

The cases cited do not support the State's position. In *Bauman* v. *Smrha,* 145 F.Supp. 617 (D. Kan. 1956), the state statute alleged to be unconstitutional because it dedicated all water in the state of Kansas to its people and effected a state-wide transformation from a riparian to an appropriation system of water allocation was expressly made "subject to vested rights." (Kan. Gen. Stat. 1949, ch. 82a, §82a-703). [2] The decision in *In re Catherwood's Trust,* 405 Pa. 61, 173 A.2d 86 (1961), was based on the Pennsylvania Supreme Court's determination that an income beneficiary of a trust has no vested interest in accumulated unpaid corporate earnings on stock in the trust [3] and therefore any change in the rules affecting apportionment between life tenants and remaindermen could not be said to be a taking without compensation in violation of the Fourteenth Amendment. As in *Demorest* v.

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[1] Response, to Jurisdictional Statement, or, in the Alternative, Petitions for Writ of Certiorari, at 5.

[2] The statute continued: "Nothing in this act contained shall impair the vested right of any person except for nonuse."

[3] 173 A.2d at 90.

City Bank Farmers Trust Company, 321 U.S. 36 (1944), the Court distinguished the apportionment rules from rules of property. Finally, in *Patterson* v. *McCormick,* 177 N.C. 488, 99 S.E. 401 (1919), not only was no constitutional issue raised, but there did not in fact exist a consistent line of decisions on which the plaintiffs could reasonably have relied.

3. The State's assertion[4] that Appellants and Petitioners should not have relied on the decisions of the Hawaii Supreme Court delineating the system for allocation of water in Hawaii—because they were indefinite and failed to reconcile ancient Hawaiian water rights with the language of Hawaii Rev. Stat. § 7-1—is totally unfounded. In its decision in *McBryde I,* the Hawaii Supreme Court repeatedly acknowledged that it was overruling prior decisions;[5] and, in his dissenting opinion, Judge Levinson characterized the decision as "totally unforseeable," and a "radical departure" from "long established and unique principles of Hawaiian water law," "solidly bottomed in Hawaiian judicial precedent."[6] In view of these statements, it can hardly be contended that Hawaiian water law was in such a state of uncertainty or flux that the Appellants' and Petitioners' reliance on existing decisions was unreasonable.[7]

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[4] Response to Jurisdictional Statement, or, in the Alternative, Petitions for Writ of Certiorari, at 5-11.

[5] See Jurisdictional Statement, or, in the Alternative, Petition for a Writ of Certiorari to the Supreme Court of Hawaii, McBryde v. Hawaii, at 23, footnote 54.

[6] 55 Haw. at 302, 262, 265 (App. 156, 116, 119). It is the "sudden about face from these decisions" (App. 129) that impelled the dissenting opinion's treatment of the constitutional questions.

[7] See also "Partial List of Cases Overruled by the Decision Below," Jurisdictional Statement, or, in the Alternative, Petition for a Writ of Certiorari to the Supreme Court of Hawaii, McBryde v. Hawaii, Annex B, at 52-54.

The Motion to Dismiss makes no reference to Stat. L. Kamehameha III, 81 et seq. (1847), or to the Further Principles enacted by the Hawaiian Government on August 6, 1850, Hawaiian Laws 1850, p. 202, and the Further Principles are cited only in a footnote at the close of the Response to the Petitions for Certiorari. Yet, Stat. L. Kamehameha III, 81 et seq. (1847) and the Further Principles show clearly that the statute which has been periodically re-enacted and now appears as § 7-1 of the Hawaiian Revised Statutes, on which the State almost exclusively relies, could not have had the purpose and effect of reserving to the public the title to all surface waters attributed to it by the court below and by the State of Hawaii in its response. [8]

This emphasizes the fact that the decision of the Supreme Court of Hawaii overturns more than a century of settled land law in Hawaii, and amounts to a taking of property without compensation, and under the circumstances, without due process of law.

4. The State of Hawaii, in its Response, makes no reference whatever to the res judicata contention, and the related Supremacy Clause and full faith and credit issues, which are particularly relied on by Olokele Sugar Company and by Selwyn A. Robinson, et al. Indeed, the State of Hawaii, like the Supreme Court of Hawaii, makes no reference to the fact that the decision in *Territory* v. *Gay,* 31 Haw. 376 (1930), was affirmed by the Circuit Court of Appeals for the Ninth Circuit in 52 F.2d 356 (1931), and certiorari was denied, 284 U.S. 677 (1931). These issues, like the other issues in the case, are real and substantial,

[8] This is convincingly put by Judge Levinson in his dissenting opinion (App. 124): "For if all 'usufructs' of land were retained by the king, then nothing but bare legal title was passed by the Mahele and subsequent Land Commission Awards—a proposition which is patently incorrect if not absurd."

and are important not only to the parties but to the sound development of the law. They are not made less substantial and important by the failure of the State to deal with them in its response to the Jurisdictional Statement and the Petitions.

CONCLUSION

In substance, the State makes no answer to the contentions advanced in the Jurisdictional Statement and the Petitions for Certiorari. Those questions are substantial. The taking of property for public use, in these circumstances, involving disregard of more than a century of established property law, and the ignoring of a prior decision of the Court of Appeals for the Ninth Circuit, which is entitled to res judicata effect, presents a situation where the court below has so far departed from established principles of law as to merit review of its decision by this Court.

Respectfully submitted,

ERWIN N. GRISWOLD
J. RUSSELL CADES
ROBERT B. BUNN
Counsel for McBryde Sugar Co., Ltd.

WILLIAM F. QUINN
Counsel for Olokele Sugar Co., Ltd.

J. GARNER ANTHONY
JOHN H. R. PLEWS
Counsel for Selwyn A. Robinson, et al.

ROBERT B. BUNN
CLINTON I. SHIRAISHI
Counsel for Ida Albarado, et al.

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